No. 82-352

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PUEBLO AIRCRAFT SERVICE, INC.,
Petitioner

versus

THE CITY OF PUEBLO, COLORADO, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Petitioner now replies to new matters raised in the Respondents' Brief in Opposition to Petition for Writ of Certiorari.

Respondent, the City of Pueblo, Colorado (hereinafter referred to as "Pueblo"), asserts that the opinion of the Tenth Circuit simply affirmed the district court's summary judgment on the facts. Nothing could be further from the truth.

The district court did rule that even if Pueblo were not immune from the antitrust laws, summary judgment on the

facts was appropriate. However, the Tenth Circuit very carefully avoided affirming the district court on these grounds. In its opinion, the Tenth Circuit said:

> ...We rely upon the District Court's detailed Opinion and Order of September 26, 1980, in affirming the District Court's grant of summary judgment to the *remaining defendants.* [Emphasis added.]
> p. A-7 of the Petition.

The "remaining defendants" were all the defendants *except* Pueblo. The Tenth Circuit was careful *not* to affirm summary judgment on the facts as to the City of Pueblo. After making the statement quoted above, the Tenth Circuit went into a lengthy discussion of municipal antitrust immunity. Had the Tenth Circuit intended simply to affirm a summary judgment on the facts, there would have been no need for it to issue a lengthy opinion on municipal antitrust immunity.

One is constrained to wonder precisely what the Tenth Circuit meant in its affirmance on the merits, and why that court excluded the City from such affirmance. It might be urged that as to certain claims the City might be liable even though the private defendants are not, as for example for the tying claims that the City (but not the other defendants) monopolized the sale of aviation fuel on the airport by requiring all operators to purchase all their fuel requirements only from the City. Or it might be suggested that the appellate court was concerned that the private defendants have a weaker claim to immunity, and so the court wished to buttress its d[illegible]ion as to them.

In any event, the Tenth Circuit recognized that the district court's summary judgment on the facts with respect to Pueblo, if not to the other defendants, was clearly wrong. So it did not affirm that portion of the district court's ruling.

But even if the Tenth Circuit had affirmed summary judgment on the facts by the district court, that affirmance was error. Petitioner's first two claims for relief against Pueblo alleged that the City of Pueblo entered into an illegal tying contract with petitioner in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 14. In its ruling on summary judgment as to these claims (pp. A-33 and A-34), the district court ignored the standards under the Sherman Act as set forth by the Supreme Court in *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958), and in *Fortner Enterprises* v. *U.S. Steel,* 394 U.S. 495 (1969). Note as one example the district court's use of the rule of reason rather than a *per se* approach in analysing the tying claim. And the Tenth Circuit in its ruling conflicted with the established law on the Clayton Act as discussed in *Moore* v. *J. A. Matthews & Co.,* 550 F.2d 1201 (9th Cir. 1977). Since the district court did not even make an acceptable legal analysis of plaintiff's first two claims, it would have been error worthy of certiorari for the Tenth Circuit to have affirmed the district court on this point.

Moreover, the Tenth Circuit's holding on the merits is *dictum.* Since the court found the city immune, there in fact existed no case or controversy on the issue of liability. Thus, reversal on the immunity issue by the Supreme Court should result in a remand requiring reconsideration of the liability issue standing alone.

Finally, there are policy considerations suggesting a grant of certiorari in the instant case. Simply put, an appellate court should not be permitted to "back door" a major opinion—which on its face appears to be inconsistent with prior Supreme Court decisions—merely through the use of a so-called "alternative holding" which is really dictum and not supported by proper analysis, and which decides an issue the court did not have to reach.

Petitioner respectfully prays for a writ of certiorari to enable this Court to review this matter.

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